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No. 365 Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1957

El Paso Natural Gas Company and
Pacific Northwest Pipeline Corporation,

Petitioners,

—against—

United States of America,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

The Brief in Opposition effectively confirms the reasons advanced by petitioners why the writ of certiorari should be granted.

1. Respondent agrees (RB 6) that the underlying question in the proceedings before the Federal Power Commission is whether it is in the public interest that there be two independently operated pipeline systems or a single integrated system (accord: Petition 13). Respondent agrees (RB 6) that "[u]nlike the broad standard of 'public convenience and necessity' in Section 7 of the Natural Gas Act, the touchstone of illegality under the Clayton Act is a narrower test" (accord: Petition 16-22).

Having thus recognized that the ultimate question posed by the unification of the two pipeline companies is before

the Commission for determination under the broader and more comprehensive standards of the Natural Gas Act, respondent further agrees (RB 10) that "whatever the district court's decision may be, it cannot oust the Commission of jurisdiction to decide the asset consolidation proceeding" according to those standards (accord: Petition 10-13).

These statements by respondent implicitly recognize the Congressional determination that the specific statutory scheme regulating the natural gas industry in detail and providing for an all-embracive test applied by an expert tribunal shall have primacy over the narrow test of the Clayton Act, which by its own terms has limited application to a regulated industry.

The error in the formalistic effort by respondent to treat the question at issue in the lawsuit as legally independent of the Commission proceedings, discussed at pages 13-16 of the Petition, is further reflected in respondent's inconsistent argument, on the one hand (RB 8), that "the Power Commission has no jurisdiction to pass on the transaction challenged in the Clayton Act case", while obliged to concede, on the other (RB 10), that the question of whether "petitioners have violated the Clayton Act through the stock acquisition . . . would be a factor for the Federal Power Commission to consider in determining whether the asset consolidation is required by the public convenience and necessity" (accord: Petition 20).

2. Respondent states (RB 10) that the proceedings before the District Court and before the Federal Power Commission are to be tried "under different standards", and then, entirely overlooking the public interest involved, asserts that this is only an "inconvenience" to petitioners (RB 11) and does not warrant immediate intervention by this Court.

The considerations necessitating immediate review here, however, are precisely the same as those present in *Far East Conference* v. *United States,* 342 U. S. 570, and *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196. The compelling reason for granting certiorari is the potential "frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by that performance." (325 U. S. at 204.)

Respondent supports its contention that only "convenience" is at stake with the assertion (RB 10) that the Commission's approval of the proposed acquisition of assets "could not oust the district court of its jurisdiction to decide the Clayton Act case".

Respondent thereby ignores the explicit exemption provision of Section 7 of the Clayton Act itself for acquisitions approved by the Federal Power Commission. Respondent further disregards the fact that the acquisition by merger of the facilities of Pacific Northwest, immunized by the Commission's approval, would constitute the ultimate and fullest degree of unification of the two companies, during which the stock of Pacific Northwest would disappear. See *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151, 170.

The Petition at pages 31 to 33 focuses upon the importance of an immediate resolution of the jurisdictional question posed by the competing proceedings before either tribunal has acted. We note that the unseemly race of diligence, which as we pointed out in the Petition (p. 32) the competing proceedings invite, already has commenced, as reflected in the urgency recently evidenced by the District Court to make a rapid determination of the Clayton Act suit.

The District Judge on December 20, 1957, in a proceeding in which defendants were not involved and without notice, and without the presence of defendants' New York or Houston counsel, peremptorily fixed the trial date for March 3, 1958, and ordered completion of all production of documents by February 3, 1958.

Respectfully submitted,

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December 30, 1957.